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IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

MARTIN ZELNIK,

Petitioner,

--against--

FASHION INSTITUTE OF TECHNOLOGY, STATE UNIVERSITY OF NEW YORK, JOYCE F. BROWN, INDIVIDUALLY AS PRESIDENT OF FASHION INSTITUTE OF TECHNOLOGY, STATE UNIVERSITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Nathan Z. Dershowitz*
Victoria B. Eiger
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

* Counsel of Record

Attorneys for Petitioner
MARTIN ZELNIK

QUESTION PRESENTED

Where a public college has retaliated against a professor for exercising his First Amendment rights to speak out on issues of public importance by refusing to confer on him "Professor Emeritus" status, is the retaliation, as a matter of law, too trivial both in itself and in terms of its potential chilling effect on others to merit First Amendment protection so as to justify summary judgment.

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The decision of the Court of Appeals for the Second Circuit is reported at 464 F.3d 217 (2d Cir. 2006), and is reproduced in the Appendix at App. 1. The decision of the District Court granting summary judgment in favor of the defendants was delivered orally on September 2, 2005 and is reproduced in the Appendix at App. 22.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on September 14, 2006. (App. 11) A timely filed petition for rehearing and rehearing en banc was denied by order dated December 6, 2006, entered on December 8, 2006. (App. 33) This Court has jurisdiction to review the judgment in question pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment provides, in pertinent part:

> no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Martin Zelnik brought suit in the United States District Court for the Southern District of New York against a public college, Fashion Institute of Technology, State University of New York ("FIT") and FIT's president, Dr. Joyce Brown ("Brown"). (Complaint, A: 35)[1]

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[1] References preceded by "A:" refer to documents from the district court record reproduced in the Joint Appendix filed in the Second Circuit Court of Appeal, and so numbered therein.

Zelnik alleged that FIT and its president had violated his rights under the First Amendment to freedom of speech, freedom of association and freedom to petition for the redress of grievances by refusing to act on his nomination for professor emeritus status in retaliation for his political speech and political action. (A: 42-57)

Zelnik had been a member of the FIT faculty from 1969 through 1999, holding the title of full professor in the Interior Design Department at the time of his retirement. (A: 124) He is now retired, but over his thirty years of service at FIT, he made major contributions to the Department and the college, including serving as Department chair, developing the Department's baccalaureate program, and obtaining accreditation for the Department and the Art & Design Division. Zelnik also made significant contributions to the college as a whole, serving as president of the FIT Faculty Association, its Affirmative Action Task Force, and its Strategic Planning Committee. He is the author of three major professional reference books that are published in nine languages, and which are widely used both in academic institutions and in interior design/architecture firms in the United States and worldwide. He has held national office in several major professional associations, and received numerous national awards for his contribution to design and education. (A: 125-28)

In addition to his academic work, Zelnik has practiced and continues to practice as an architect and interior designer. Zelnik and another former FIT faculty member are shareholders in a company that owns property at 242 West 27th Street in Manhattan, the block where FIT's buildings are located. They conduct their architecture and interior design practice from that location. (A: 128)

Since the late 1970's FIT has periodically considered permanently closing that block of 27th Street, between 7th and 8th Avenues, and Zelnik publicly supported such efforts. In

early 1999, Zelnik was informed by lawyers representing FIT that FIT intended to permanently close a portion of 27th Street as part of a "Streetscape" project that would create a campus-type environment for FIT. Zelnik voiced concerns that the portion of 27th Street that remained open would become a two-way dead end street culminating in a cul-de-sac or turnaround which, as a result of acknowledged design flaws, would create serious dangers for pedestrians. (A: 128-31)

He and other members of the community formed a neighborhood block association to serve as a forum to discuss the community's concerns and to propose alternatives and safety improvements to FIT's Streetscape plan. The association, among other things, commissioned a traffic study, which concluded that the proposed turnaround would be dangerous to pedestrians and, especially, to FIT students and the elderly. The association was not alone in raising issues about the Streetscape plan: the Manhattan borough president, city council members, and a state senator all voiced concerns, as did two community boards. The local community board twice voted against the project. (A: 131-34)

In the fall of 2000, a group of opponents of the Streetscape plan, including Zelnik and his partner (also a retired FIT professor), commenced a state court proceeding seeking an environmental review of the proposed project. The action was dismissed by the trial court, reinstated on appeal, but subsequently terminated because the petitioners lacked funds to continue it. (A: 134-35)

For many years, FIT has had a policy and procedure under which retired faculty members may be granted the title "Professor Emeritus." (A: 135) In the words of FIT and its president, emeritus status is "an exceptional honor signifying excellence and one that is rarely granted." (A: 326) According to Brown, the status "bestows upon [its holders] a title that forever weds them to the institution." (A: 473) Though

emeritus status carries with it no financial compensation from FIT, it confers the significant academic distinction of " continued association with the institution and the value that such status would confer." (A: 475) According to Brown, when FIT confers emeritus status, "it is, in fact, saying to the world that this person represents the best of what we have. This person is at the top of their game, the top of their field." (A: 472) As the former secretary to the college stated in an affidavit, emeritus status is coveted by FIT faculty because it is "a highly distinguished title that confers prestige and respect both within [FIT] and the wider academic and professional communities." (A: 706)

To be eligible for emeritus status, a faculty member must 1) hold the rank of full professor at the time of retirement, 2) be a member of the faculty for 25 years or have been the prime mover in the introduction, organization and development of a department or an area of study within a department in the college which has been continued for a minimum of 10 years, and 3) have gained recognition in the college for the quality of service to the college above and beyond the requirements of the positions held. (A: 213-220) Zelnik satisfied and exceeded all of the criteria for emeritus status, as established by FIT's Board of Trustees. (A: 112-115) On May 18, 2000, the Interior Design Department faculty unanimously voted to recommend Zelnik for emeritus status. The Department's Chair notified the FIT Board of Trustees and President Brown of the nomination, and requested their concurrence and approval in granting this well deserved distinction. (A: 118)

When, six months later, a faculty member inquired as to the status of Zelnik's nomination, he was told that it was on Brown's desk, "at the bottom of the pile." (A: 714 A) On further inquiry, he was told that the delay in reviewing the nomination was due to Zelnik's opposition to the Streetscape project. (A: 714 A)

After a year and a half passed with no action on the nomination, the Interior Design Department contacted Brown to express concern that Zelnik's opposition to the Streetscape plan may have played a role in the administration's treatment of the nomination, and to request prompt action to approve the nomination. (A: 65-66, 137) Although there was, at most, a technical defect in that the signature of the Dean of FIT's Art & Design Division was not on a separate signature page, President Brown took the position that the nomination was not appropriately before her because she had not yet received a recommendation from that Dean. (A: 67-69, 137-38)

Brown also stated that, even if the appropriate procedures had been followed, she would not recommend Zelnik for emeritus status because of his opposition to the Streetscape plan. Her memorandum concluded that she might consider recommending his nomination after the dispute concerning Streetscape ended. (A: 68-69)

In the spring of 2002, the Faculty Association's executive committee met with Brown and expressed concern that FIT had not acted on Zelnik's nomination. (A: 224) Brown became angry, expressed displeasure that Zelnik had spoken against the Streetscape project, and stated that she would not recommend his nomination as long as any litigation concerning Streetscape was pending. (A: 224-25)

In November, 2002, the Interior Design Department again nominated Zelnik for emeritus status. (A: 72-74, 138, 710-11) The nomination followed the established procedures, and included the recommendation of the Dean of the Art & Design Division. (A: 75) On March 28, 2003, Brown sent a memorandum to the Chair of the Interior Design Department which again linked her refusal to recommend Zelnik for emeritus status to his opposition to the Streetscape project and his speech on that subject. (A: 75) Zelnik, to date, has not received emeritus status. (A: 139)

Zelnik filed suit in the United States District Court for the Southern District of New York, invoking, inter alia, 42 U.S.C. § 1983. He sought injunctive and declaratory relief, compensatory and punitive damages, attorneys' fees and costs, and other appropriate legal and equitable relief. (A: 35-36) After the close of discovery, both sides moved for summary judgment. (A: 110-285, 286) The district court, which had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4), granted summary judgment in favor of the defendants. (App. 22)

In a decision read from the bench, the district court held that, to recover, Zelnik was required to establish an "adverse employment action." (App. 26) The court further ruled that Zelnik failed to raise a triable issue of fact in that regard because he could not demonstrate that the denial of emeritus status resulted in a "materially adverse change in the terms and conditions of employment." (App. 27-31) The district court determined that emeritus status carried no economic or other tangible benefits. (App. 29-31) It further held that Zelnik had not demonstrated that he had been subjected to a pattern of harassment that would "probably deter an average person from the exercise of their [sic] First Amendment rights." (App. 31)

Though it determined that the district court had applied an incorrect principle of law, the Court of Appeals for the Second Circuit affirmed. (App. 14-16) The Second Circuit stated that, in a Title VII or ADEA discrimination case, to recover, a plaintiff must show an adverse employment action; that is to say, a "materially adverse change in the terms and conditions of employment." (App. 15) However, to make out a First Amendment retaliation claim, that showing was not required. (App. 15)

According to the Second Circuit, in the context of a First Amendment retaliation claim, the adverse action required is "retaliatory conduct that would deter a similarly situated

individual of ordinary firmness from exercising his or her constitutional rights." (App. 15-18)

Classifying the refusal to confer emeritus status on Zelnik as a "de minimis" deprivation, the panel affirmed the grant of summary judgment. (App. 16-19) It stated, "We simply do not believe, based upon our review of the factual record, that a jury could conclude that the denial of, or the refusal to consider for, emeritus status would deter an individual of ordinary firmness, situated similarly to Zelnik, from exercising his free speech rights under the facts in this case." (App. 18)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION MISPERCEIVES THE SCOPE OF THE FIRST AMENDMENT AND THE ROLE OF THE FEDERAL COURTS IN PROTECTING FIRST AMENDMENT RIGHTS

A public college retaliated against a professor for his political speech, associational activities, and his use of the courts to seek redress of his grievances. The chosen – and only available – retaliation was denial of professor emeritus status. The Second Circuit held that, as a matter of law, the retaliation was too trivial to constitute a violation of the First Amendment; it would not chill others in the exercise of their First Amendment freedoms. Accordingly, Zelnik could not take his case to the jury for determination of whether a Constitutional wrong had occurred, and, if so, what compensatory, punitive, or nominal damages the wrongdoers should pay.

The Second Circuit's ruling undermines well-settled First Amendment principles. Although this action was instituted by the petitioner as a matter of principle to vindicate core First Amendment values, and out of concern for the chilling of free

speech and open discourse on the FIT campus, the Second Circuit critically underestimated those values because the retaliation against him did not involve harm that could easily be measured in dollars and cents.

This case involves values far more important than money, and, for that reason alone, is worthy of this Court's attention. The Second Circuit's decision conflicts with this Court's jurisprudence, improperly narrows the scope of the First Amendment's protection, and inappropriately substitutes the personal opinions of three federal judges for the considered judgment of a jury on the question of what has value in this world and what might have a chilling effect on persons of ordinary firmness in public schools, colleges, universities, and other public workplaces. For these reasons, too, certiorari should be granted.

Over 200 years ago, Chief Justice John Marshall, in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), wrote reverently about individual rights when he stated, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees..." Owen v. City of Independence, Missouri, 445 U.S. 622 (1980).

Congress provided a vehicle to safeguard rights guaranteed by the Constitution, including First Amendment rights, in 42 U.S.C. § 1983. It states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The primary purposes of section 1983 are to deter state actors from using their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. Wyatt v. Cole, 504 U.S. 158 (1992). Another purpose is retributive: to punish those who have committed Constitutional wrongs. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

Among the most cherished of our Constitutional rights are those protected by the First Amendment. The "core value" of the Free Speech Clause of the First Amendment is "the public interest in having free and unhindered debate on matters of public importance." Pickering v. Board of Education, 391 U.S. 563, 573 (1968). Matters of public concern are at the heart of the First Amendment, for it is only when they are brought to light that we may achieve "uninhibited, robust, and wide-open debate" about the shape and function of the government. New York Times v. Sullivan, 376 U.S. 254, 270 (1964). The First Amendment's guarantees of free association and the right to petition the government for redress of grievance serve equally important purposes.

The First Amendment rights of public employees have been a subject of continuing interest to this Court. The framework for considering those rights was established in the Pickering case. There the Court held that, while the State, as an employer, has an interest in promoting the efficiency of the public services it performs through its employees, that interest must be balanced against the interests of the teacher, as a citizen, in commenting upon matters of public concern. In Pickering, the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance

of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." Id. at 572-73 (footnote omitted). Under those circumstances, the balance had to be struck in favor of the teacher: "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." Id. at 573. Compare Garcetti v. Ceballos, __ U.S. __, 126 S. Ct. 1951 (2006) (when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline).

This Court's modern First Amendment precedents have "long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

> Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights,' Laird v. Tatum, 408 U.S. 1, 11, 92 S.Ct. 2318, 2324 (1972), our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech' even if he has no entitlement to that benefit. Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972).

Board of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996). See also United States v. National Treasury Employees Union, 513 U.S. 454 (1995) (government employees are

protected from undue burdens on their expressive activities created by a prohibition against accepting honoraria).

Thus, it is clear that where a citizen or public employee is exercising First Amendment rights, as was Zelnik, a state actor is not permitted to retaliate against him for such exercise. The question this case presents is what kind of conduct constitutes retaliation that is actionable under federal law.

Last year, in Burlington Northern & Santa Fe Railway Co. v. White, __ U.S. __, 126 S.Ct. 2405 (2006), a Title VII retaliation case, this Court endorsed an expansive standard for determining whether actionable retaliation had taken place, rejecting more restrictive tests that several of the Courts of Appeals had adopted. The Court held that an employee could recover for retaliation under Title VII for any employer action that was "materially adverse" to a reasonable employee, whether the action was workplace related or not.

In so ruling, this Court set a low bar, and did so deliberately, in order to fulfill the purpose of the statute. As the Court explained, the requirement of material adversity was intended simply to separate significant from trivial harms. 126 S.Ct. at 2415. "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Id. The plaintiff is required to show only that the challenged actions "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Id. "[N]ormally[,] petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." Id.

But, depending upon context, even such relatively insignificant actions may be actionable. As Judge Posner wrote in Bart v. Telford, 677 F.2d 622 (7th Cir. 1982), after noting that many of the employee's claims of harassment seemed trivial,

"'[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." Id. at 625. While "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise," "[i]t is a question of fact whether the campaign [of petty harassments] reached the threshold of actionability under section 1983." Id.

Through purporting to apply a standard equivalent to that set forth in Burlington Northern,[2] the Second Circuit set the Burlington Northern standard on its head, erecting an improperly high threshold for actionability. Compounding its mistake, finding no genuine issue of fact, it arrogated to itself, rather than leaving to a jury, the determination whether plaintiff could make the required showing. This was error. The record was unclear as to whether a professor with emeritus status would be entitled to a telephone line and office space; the former secretary to the FIT president and the FIT trustees attested that such benefits were afforded to professors emeriti but the document she recalled and had helped prepare that spelled out these benefits was not found in FIT's or its president's files. (See App. 20) But, assuming that Zelnik failed to make a threshold showing that emeritus status carried with it certain perquisites at FIT, nevertheless, the Court erred in rejecting Zelnik's claim, because its decision overlooks the reality that that honorary title had monetary value outside and independent of FIT. Zelnik remains a practicing designer and architect, and the emeritus title confers

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[2] "Ordinary firmness" is not necessarily the equivalent of "reasonableness." "Firmness" suggests the quality of "holding one's ground," but in the context of First Amendment rights and the chilling effect, the question is not so much whether a person will hold his or her ground, but whether he or she will be discouraged from entering the fray at all.

status that could well translate into increased business and enhanced revenues. It could also enhance his opportunities to speak and publish, and serve on boards or committees, activities which could themselves be income producing, or lead to other income–generating opportunities.

Accordingly, the title's real benefit comes from the intangible benefits it confers, such as prestige, status and respect within FIT and the wider community, which have value in themselves. This claim could not properly be rejected because Zelnik "failed to adduce any evidence of such matters beyond his conclusory statements." (App. 19) No evidence is necessary to prove the proposition that kudos count, especially in the academic world. In any event, Brown herself acknowledged that the title is "an exceptional honor signifying excellence" and that the "continued association with the institution" represented by emeritus status has "value." (A: 326, 472-73, 475)

That is, indeed, self-evident. Emeritus status is an honor, a recognition of significant service and contribution to the college to which Zelnik had devoted his entire academic career. In the academic world, where the rewards are not primarily financial ones, such honors are particularly important. In academia, the rewards come largely in the form of an individual's personal accomplishments and the recognition by others that those accomplishments have been substantial and are valued.[3] A title like "Professor Emeritus" is a powerful symbol of an academic's lifetime accomplishments and the esteem in

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[3] Though it is largely beside the point to try to measure the value of such honors in terms of cold hard cash, that equation is undeniable. In other situations honors can, in some sense, be "bought." Many philanthropists and institutional benefactors make substantial monetary donations motivated, at least in part, by the honor of being honored, in one way or another, by the object of their largesse.

which he or she has been held. Symbolic rewards are benefits, just like symbolic conduct may be protected speech. Thus, the Second Circuit panel was wrong in concluding that the value of the emeritus designation was so trivial that no person of ordinary firmness would be chilled in the exercise of First Amendment freedom by the prospect of the retaliation that Zelnik suffered.

In light of the interests at stake, it is wrong to put on blinders when considering the potential impact on others of the particular retaliatory action that was taken. The president of a college like FIT exercises enormous power over the careers of the faculty and staff. In particular, the president has much to say about a faculty member's professional future, including who is appointed to the faculty at all, and who rises from instructor to assistant to associate to full professor. The president also has influence over other matters important to faculty members, including which grants are supported, and who receives plum assignments, sabbaticals, and the like.

In this case, the retaliation against Zelnik – who had already become a full professor – took the only form that it could take – a denial of professor emeritus status. For others looking on, however, the message that President Brown and FIT's conduct sent, was a frightening, chilling one: if you exercise your First Amendment rights on subjects of public concern in which we have an interest, you may be hurt in whatever way we have the power to hurt you.

The courts below erred in failing to appreciate this, and in failing to appreciate that a jury should make these determinations. Federal judges, with their life tenure and special knowledge of the law, are particularly ill-suited to determine what kind of retaliatory action would chill other, perhaps less

hardy, souls in the exercise of their Constitutional rights.[4] "Ultimately, this sort of question is usually best left to the judgment of a jury, twelve ordinary people, than to that of a judge, one ordinary person. The jury, after all, represents the conscience of the community." Garcia v. City of Trenton, Missouri, 348 F.3d 726 (8th Cir. 2003) (post-verdict grant of judgment to the defendant was error; there was sufficient evidence to support jury's conclusion that plaintiff's receipt of four parking tickets totaling $35 after complaining to the mayor about non-enforcement of other town ordinances would chill a person of ordinary firmness).[5]

Thaddeus-X v. Blatter,175 F.3d 378 (6th Cir. 1999) (en banc), provides a dramatic demonstration why these are questions that must be left to the common sense and collective life experiences of jurors, not to judges. In Thaddeus-X, the Sixth Circuit judges, sitting en banc, had wildly different views as to whether the prospect of receiving cold food would deter a

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[4] Though Justice Holmes noted, albeit in a different context, that "a judge of the United States is expected to be a man of ordinary firmness of character," Toledo Newspaper Co. v. United States, 247 U.S. 402, 424 (1918) (Holmes, J., dissenting), overruled in part by Nye v. United States, 313 U.S. 33 (1941), one would expect that federal judges, male and female, would be above average in terms of their firmness and courage, and thus should not be using their own character or qualities as a benchmark.

[5] The grant of summary judgment in these circumstances necessarily raises Seventh Amendment concerns. Cf. Kreigh v. Westinghouse, Church, Kerr, & Co., 214 U.S. 249 (1909) (error in taking a negligence case from the jury; "Questions of negligence do not become questions of law, to be decided by the court, except 'where the facts are such that all reasonable men must draw the same conclusion from them...").

prisoner of ordinary firmness from exercising his right to access the courts. One judge, writing for himself and five other circuit judges, concluded that, as a matter of law, the threat of being served cold food could not possibly deter the average convicted criminal from filing a lawsuit. 175 F.3d at 403. Eight other judges voted to remand the case to the district court for consideration of that issue in the first instance though, it would seem, if the circuit judges could not agree on an answer, the question should be left to the jury. See also Lucas v. Monroe County, 203 F.3d 964 (6th Cir. 2000) (defendants not entitled to summary judgment on free speech retaliation claim; "There is no doubt that [removal of company from the stand-by tow call list] would deter the average wrecker service operator from voicing similar criticisms of the Sheriff"); Eaton v. Meneley, 379 F.3d 949 (10th Cir. 2004) (using a computer system available only to law enforcement personnel, sheriff ran a criminal record check of plaintiffs who sponsored a recall petition to remove the sheriff from office; Court of Appeals disagreed with district court's determination that conduct would have chilled persons of ordinary firmness "who enter the arena of political debate to sponsor a recall petition against a sheriff who they accuse of abusing his office" from engaging in protected political expression, while purporting to reaffirm that "the objective standard of a person of ordinary firmness is a 'vigorous standard'").

At the least, Zelnik should have been permitted to go to the jury with his claims. This Court has rejected the imposition of special hurdles in Section 1983 suits, even as a way to dispose of insubstantial claims and protect public servants from the burden of trial and discovery. Thus, Crawford-El v. Britton, 523 U.S. 574 (1998), disapproved a Circuit requirement that a prisoner-plaintiff establish the defendant's unconstitutional motive by clear and convincing evidence in order to avoid summary judgment. Erecting a substantive standard that is too onerous or applying a reasonable standard in an unreasonable fashion – as did the Court of Appeals here – operates just like a

special procedural hurdle, and should be repudiated by this Court.

Crawford-El is instructive for an additional reason. The retaliation that the prisoner-plaintiff claimed was taken against him for exercise of his First Amendment rights involved a prison official having a family member of the prisoner pick up his property and arrange for its delivery to the institution to which he was transferred, rather than sending his belongings directly to that facility. Though Justice Kennedy, in his concurrence, referred generally to some prisoner suits falling "somewhere between the frivolous and the farcical," thus "foster[ing] disrespect for our laws," 523 U.S. at 607, no member of the Court suggested that Crawford-El could not prevail on his First Amendment retaliation claim because the retaliation he claimed to have suffered was too trivial to constitute actionable retaliation at all.[6]

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[6] Then-Chief Justice Rehnquist touched the issue in his dissent in discussing the costs of his proposal that a government official have immunity from suit so long as he can offer a legitimate reason for the action that is being challenged, and the plaintiff is unable to establish by on objective evidence that the offered reason is actually a pretext:

> If the purpose of § 1983 is to 'deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails,' it is hard to see how that purpose is substantially advanced if petitioner's suit is allowed to proceed. Wyatt v. Cole, 504 U.S. at 161, 112 S.Ct., at 1830. Petitioner has already fully exercised his 'federally guaranteed rights.' Providing compensation to him, even if his claim is meritorious, will foster increased constitutional

Far from avoiding trivialization of the First Amendment, the Second Circuit's affirmance of the grant of summary judgment to the defendants in this matter denigrates the important rights protected by that Amendment. The activities of Zelnik which provoked retaliation were classic First Amendment activities – political speech, political action, and the petitioning of the courts for redress – undertaken in connection with an issue of substantial and undeniable public importance. Though the retaliation was petty in the sense that it was the product of a narrow mind, it was not petty or trivial in its effect on Zelnik who values and desires emeritus status – nor would its message to others be anything but loud and clear.

Any difficulty putting a monetary value on his loss does not wipe out his Constitutional claim. A primary purpose of § 1983 is the compensation of those who have been injured by Constitutional torts, but its other purpose is deterrence. Damages based on the abstract "value" or "importance" of Constitutional rights are not authorized by § 1983; they are not a permissible element of compensatory damages in such cases. Memphis Community School District v. Stachura, 477 U.S. 299 (1986). At the same time, the absence of provable, compensable injury does not foreclose actionability under § 1983. See Carey v. Piphus, 435 U.S. 247 (1978)(students not entitled to recover substantial nonpunitive damages for suspension meted out without procedural due process, but would be entitled to recover nominal damages even if the suspensions were justified).

> freedoms only for the hypothetical subsequent individual who, given the imposition of liability in this case, will not be deterred from exercising his First Amendment rights out of fear that respondent would retaliate by misdirecting his belongings.

523 U.S. 608-09 (Rehnquist, C.J., dissenting).

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. at 266 (footnote omitted). See also Stachura, supra, 477 U.S. at 308 n.11 (nominal damages "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury").

Thus, this case is also in tension with Carey and Stachura and other decisions which recognize that a plaintiff who has proven a civil rights violation but has not proven actual compensable injury is entitled to an award of nominal damages. See Glass v. Dachel, 2 F.3d 733, 741 (7th Cir. 1993) (rejecting defendant's claim that reprimand letter does not rise to the level of constitutional significance. "If a reprimand letter addresses constitutionally protected speech, the plaintiff can establish an infringement of constitutional rights because of its deterrent effect. ... Whether the reprimand letter infringed speech does not even consider the degree of infringement. In some such cases damages would be nominal; but a minimal infringement nevertheless states a claim"). See also LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 431 (2d Cir. 1995) (nominal damages for violation of First Amendment rights); Gibeau v. Nellis, 18 F.3d 107, 110-11 (2d Cir. 1994) (in a § 1983 action, "an award of nominal damages is not discretionary where a substantive

constitutional right has been violated"); Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000) (prisoner's § 1983 action for alleged violation of First Amendment free exercise right would be construed to request nominal damages); Wolfel v. Bates, 707 F.2d 932 (6th Cir. 1983) (per curiam) (affirming award of nominal damages for violation of prisoner's First Amendment rights).[7]

The Second Circuit's decision in this case thus runs afoul of several important and complementary principles established by the Court. It takes the law in a direction in which it should not go. Because the principles involved are of great importance not only to academics, but to all public employees, and to the citizenry as a whole, certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Nathan Z. Dershowitz*
Victoria B. Eiger
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

*Counsel of Record

Dated: February 27, 2007

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[7] An award of nominal damages renders the plaintiff a prevailing party, entitled to attorneys fees under 42 U.S.C. § 1988. Farrar v. Hobby, 506 U.S. 103 (1992).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2005

(Argued: May 19, 2006 Decided: September 14, 2006)

Docket No. 05-5131-cv

MARTIN ZELNIK,

Plaintiff-Appellant,

- v. -

FASHION INSTITUTE OF TECHNOLOGY, STATE UNIVERSITY OF NEW YORK, JOYCE F. BROWN, individually as PRESIDENT OF FASHION INSTITUTE OF TECHNOLOGY, STATE UNIVERSITY OF NEW YORK,

Defendants-Appellees.

Before: MINER and POOLER, Circuit Judges, and RAKOFF, District Judge.*

Appeal from a summary judgment entered in the United States District Court for the Southern District of New York (Swain, J.) dismissing claim that plaintiff was not afforded professor emeritus status in retaliation for speech related to a matter of public concern, the District Court having determined that plaintiff failed to demonstrate any material adverse change

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* The Honorable Jed S. Rakoff, District Judge for the Southern District of New York, sitting by designation.

in the terms and conditions of his employment as a consequence of his speech.

Affirmed.

JUDITH P. BROACH, (Joshua S. C. Parkhurst, on the brief), Broach & Stulberg, LLP, New York, N.Y., for Plaintiff-Appellant.

VICTOR A. KOVNER (Peter Karanjia, on the brief), Davis Wright Tremaine, LLP, New York, N.Y., for Defendants-Appellees.

MINER, Circuit Judge:

Plaintiff-appellant Martin Zelnik ("Zelnik") appeals from a summary judgment entered in the United States District Court for the Southern District of New York (Swain, J.) in favor of 3 defendants-appellees, Fashion Institute of Technology, State University of New York ("FIT"), and the President of FIT, Dr. Joyce Brown ("Brown"). Zelnik brought this action to remedy 5 alleged deprivations of the right of free speech, the right of free association, and the right to petition the government for redress of grievances. The alleged deprivations were pleaded in claims made pursuant to 42 U.S.C. § 1983; the First and Fourteenth Amendments to the United States Constitution; and Article I, Sections 8 and 9 of the New York State Constitution. A claim 9 of defamation also was alleged, pursuant to New York State law, but was later voluntarily withdrawn by Zelnik. Following cross-motions for summary judgment, the District Court granted the motion of the defendants-appellees and dismissed the Complaint. The District Court determined that Zelnik could not establish that he had suffered an "adverse employment action," an element of his prima facie case, as he was unable to demonstrate the loss of a benefit resulting from FIT's retaliatory failure to afford him professor emeritus status. The District Court also found that no reasonable fact-finder could have determined that the conduct of defendant-appellee Brown constituted harassment of the type that would have deterred a reasonable person from exercising his free speech rights. The District Court's dismissal of Zelnik's First Amendment claim for failure to demonstrate retaliation by adverse employment action is the only ruling challenged on appeal. For the reasons that follow, we affirm the judgment of the District Court.

BACKGROUND

Zelnik is a retired faculty member of the Fashion Institute of Technology ("FIT"). FIT, located in New York City, is a public institution of higher learning in the State University of New York

("SUNY") system. FIT is located in a single block on West 27th Street between Seventh and Eighth Avenues in Manhattan. Brown has been FIT's president since June of 1998.

Zelnik was a member of the FIT faculty from 1969 through December of 1999, holding the title of Professor in the Interior Design Department at the time of his retirement. During Zelnik's thirty years of service at FIT, he made major contributions to the Interior Design Department and the school and served in many leadership positions. Zelnik occasionally has taught classes at the school as an Adjunct Professor since his retirement.

Zelnik is also a 50% owner of a six-and-a-half-story building located at 242 West 27th Street (between Seventh and Eighth Avenues). This building is situated on the same block as the FIT buildings. Zelnik and his joint business partner of thirty-five years, Julius Panero ("Panero"), operate their architecture and interior design practice, Panzel Development Associates ("Panzel"), there. Zelnik and Panero purchased the property for approximately $90,000 some years ago. Zelnik estimated the property to be worth approximately $5 million in October of 2004.

I. Zelnik's Opposition to the Streetscape Project

Sometime in February of 1999, Zelnik, as a property owner, received a letter from a law firm representing FIT, informing him that FIT intended to permanently close a portion of 27th Street between Seventh and Eighth Avenues as part of its "Streetscape" Project ("Streetscape" or the "Project"). This Project involved designs to create a campus-type environment for FIT on the closed portion of 27th street. Streetscape originally was proposed in 1979 in response to a traffic accident that resulted in an injury to a student. As originally conceived, Streetscape called for turning all or a substantial portion of West 27th Street into a pedestrian area mall, which would be closed to

all thru-traffic. The original plans called for the remainder of West 27th Street to be left open for two-way traffic, with the navigable portion of West 27th Street terminating in a cul-de-sac and "turnaround" for vehicles directly outside the FIT building in which the President's office is located. The 1979 plans, however, never were actualized.

The 1999 design of the Streetscape Project was substantially similar to the original 1979 design, but the "turnaround" was to be placed near Zelnik's property at 242 West 27th Street. Although Zelnik generally was in favor of the Streetscape Project, he and other members of the community formed an informal organization called the "27th Street Block Association" (the "Association") to discuss FIT's Streetscape plans and propose alternatives.

Zelnik's activity on behalf of the Association included, inter alia, various efforts in opposition to the Project. For example, after attending a July 1999 meeting with representatives from FIT and other interested parties regarding Streetscape, Zelnik prepared and distributed a memorandum to community members outlining his concerns about various aspects of the proposed Project. In that letter, Zelnik raised his concern that the portion of the street remaining open for automobile traffic, culminating in a cul-de-sac or "turnaround," presented a danger to pedestrians. Given as an example was the exposure of pedestrians to danger from large trucks maneuvering through the turnaround.

Also in July of 1999, Zelnik wrote a letter to a New York City Commissioner regarding the Association's opposition to Streetscape. In September 1999, Zelnik wrote a letter to FIT on behalf of the Association, asking for additional information. In March of 2000, Zelnik's business partner, Panero, spoke before two community boards on behalf of himself and Panzel and described the Streetscape project as a "disaster waiting to happen."

In June of 2000 Zelnik wrote a letter to a New York State Assemblyman, explaining the potential safety problems with the Streetscape design and traffic flow. Zelnik stated in that letter that the project would create a condition that would "ultimately result in the loss of life and limb and will cause serious bodily damage to students, staff, faculty, residents and tenants of the block."

In October of 2000, Panzel, the Association, and other individual petitioners (collectively, the "Petitioners") commenced an Article 78 proceeding, pursuant to the New York State Civil Practice Law and Rules, in the Supreme Court of the State of New York, County of New York, against the Dormitory Authority of the State of New York ("DASNY") and the Department of Transportation ("DOT") to block the execution of the Project. The Petitioners sought (i) to annul and vacate the relevant "approvals granted and the environmental quality findings made" by DASNY and DOT; (ii) to declare "the State Environmental Quality Review Negative Declaration issued by DASNY to be in violation of the State Environmental Quality Review Act and 6 N.Y.C.R.R. Part 617"; (iii) to declare "the City Environmental Quality Review Negative Declaration issued by DOT to be in violation of City Environmental and Quality Review, and Mayoral Executive Order 91 of 1977"; (iv) to annul and vacate, or prohibit, certain DOT designations of the relevant streets; and (v) costs and "other and further relief as is just and proper." The Article 78 proceeding was eventually dismissed by the court but reinstated by the New York State Appellate Division, First Department. The Petitioners subsequently failed to pursue this litigation.

In February of 2001 Zelnik gave an interview to a reporter with the Village Voice, a New York City weekly news publication, which was a part of a published article discussing the "traffic nightmare for private businesses and residents at the block's western end" and FIT's "small assault on the quality of everyday life — imposed by politically powerful players — that

turns complacent New Yorkers into outraged citizen warriors ready to descend on city hall." In March of 2001, Zelnik wrote a letter to the editor of the daily newspaper, Newsday. In that letter, Zelnik described the Project as a "dead-end crisis that will also end up being a potential killer."

II. Professor Zelnik's Nomination for the Status of Professor Emeritus

In June of 2000, the Interior Design Department (the "Department") nominated Zelnik for "emeritus status." According to FIT, emeritus status is "an exceptional honor signifying excellence and one that is rarely granted." Indeed, it appears that emeritus status at FIT has been conferred only once in the past decade. President Brown noted that emeritus status has "no remuneration" but brings with it only a "continued association with the institution and the value that such status would confer." FIT views professors with emeritus status as "representative[s] of the college." Zelnik asserts that emeritus status brings with it tangible benefits, as well as prestige, status, and respect "within FIT and the wider academic and professional communities." FIT takes the position that emeritus status carries with it no real benefit beyond the honorific title.

Zelnik claims that all faculty members in the past who (i) have met the requisite criteria for emeritus status and (ii) have either requested emeritus status, or have been nominated for emeritus status, have ultimately received emeritus status.[1] In the past twenty years, every retired Full Professor who met the threshold criteria for a conferment of emeritus status, and who

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[1] Neither party claims that satisfaction of the threshold criteria for emeritus status, coupled with either a request for emeritus status made by the retired professor or a nomination from the department, automatically entitles a retired Full Professor to emeritus status.

had been nominated by his department for emeritus status, had ultimately received such status by the Board of Trustees.

The criteria and procedures for obtaining emeritus status were established by resolutions of the Board of Trustees of FIT and are published in the FIT Faculty Handbook. Currently at FIT, and during the time that the underlying events of this action took place, in order to satisfy the criteria to have emeritus status conferred a faculty member (i) must have held the rank of Full Professor at the time of retirement; (ii) must have been a member of the faculty of the college for a minimum of twenty-five years or a "prime mover in the introduction, organization, and development of a department or an area of study within a department in the college which has been continued for a minimum of ten years"; and (iii) must have "gained recognition in the college for the quality of service to [FIT] above and beyond the requirements of the positions held." (emphasis in original). Neither the Faculty Handbook nor any other FIT publication describes any specific benefits attached to Professor Emeritus status.

The procedures for the conferral of emeritus status, according to the Board of Trustees' resolution dated October 21, 1991, are as follows. First, the retired full Professor must be nominated by the Department or Divisional Dean. Next, the Vice President of Academic Affairs must receive the nomination and recommendation from the Division Dean. Third, the President of FIT must receive the nomination and recommendation from the Vice President of Academic Affairs. Finally, the President of FIT must recommend the nomination to the FIT Board of Trustees, who then may approve the nomination.

By memorandum dated February 8, 2000, following Zelnik's retirement, Professor Joan Melnick of the FIT Interior Design Department proposed that the Department nominate Zelnik for emeritus status. The Department's faculty unanimously voted in favor of the proposal on May 18, 2000. On

June 1, 2000, Frank Memoli, Chair of the Interior Design Department, by memorandum, notified the FIT Board of Trustees, Brown, and Dario Cortes, Vice President for Academic Affairs of FIT, of the nomination and requested their "concurrence and approval in the granting of [the] well-deserved distinction."

Approximately six months after Brown was notified of the recommendation, Nicholas Politis ("Politis"), a faculty member in the Department, contacted Brown's assistant to inquire as to the status of the nomination. Politis was informed that the nomination was still on Brown's desk. In February 2001, Politis again inquired about the status of Zelnik's nomination, and Politis was told that, although it was still on Brown's desk, it was "at the bottom of the pile." In April 2001, after a third inquiry, Politis was explicitly told that the delay in reviewing appellant's nomination was due to Zelnik's opposition to the Streetscape project.

The Department sent a memorandum, dated December 12, 2001, to Brown inquiring about FIT's failure to respond to, or act on, Zelnik's nomination for emeritus status. In that memorandum, the Department stated that it had been informed by Brown's office that the nomination was put "on hold" and that "[i]t has been suggested by some that the reason for [the] delay is the fact that Professor Zelnik was among those in the community that voiced their opposition to the proposed Streetscape plan, as designed."

On January 4, 2002, Brown responded by memorandum to the faculty members of the Department, stating that she had been in receipt of the December 12, 2001, memorandum; that "[e]meritus status is an honor, not a right"; that a "faculty member does not achieve it automatically upon the completion of a list of stated requirements"; that the fact that the Department voted to nominate Zelnik "does not require [FIT] to endorse the nomination uncritically"; and that the "procedures to be followed

in evaluating a nomination once made . . . have not been followed . . . making your request to [Brown] at the very least premature." Brown then stated in that memorandum that the "threshold criteria" for emeritus consideration were set forth in the Faculty Handbook (Part III, section M.5) and that "[i]t is only on completion of those requirements that the faculty member is 'entitled to request' [nomination for] the honor of the emeritus title."

While Brown stated in her memorandum of January 4, 2002, that the failure to recommend Zelnik for emeritus status was not due to his voiced opposition to Streetscape and that she "welcome[d] the opinion of every member of the FIT community on every project that the College takes on," Brown also stated:

> Professor Zelnik did not simply join members of the community in opposing the Streetscape plan because of fears that it "posed a threat to the safety and welfare of the community . . . ." Rather, Professor Zelnik owns property at that end of 27th Street, and his interest in opposing the plan was personal, involving access to his building. Professor Zelnik confirmed that fact when he continued his efforts to prevent Streetscape, unabated, even after the College responded to his complaints and those of his fellow property owners by enhancing the scenic aspects of that end of the street, as they had demanded, and by moving the turnaround farther east to facilitate access to their property. Our concessions did nothing to stanch Professor Zelnik's efforts to prevent Streetscape.
>
> Furthermore, Professor Zelnik has chosen to advance those personal interests in a manner that is nothing less than dishonorable. He has falsely impugned the College's motives,

> intentions, and reputation in a very public way, and has joined the chorus of accusers charging the [C]ollege with irresponsible behavior and of deliberately endangering the welfare of the elderly, the young, and the infirm in order to selfishly take real estate away from the community in pursuit of an "elitist" agenda. . . .
>
> Thus, even if Professor Zelnik had met the threshold requirements for consideration, and even if you had obtained the necessary administrative recommendations, I could not in good conscience recommend that the College honor Professor Zelnik at this time. There is nothing that would require the object of Professor Zelnik's slanderous statements — our College — to pay honor to the individual maligning it, and I would not recommend that it do so.

Brown concluded her memorandum, however, by stating that she "might consider" recommending Zelnik's nomination in the future once litigation between Zelnik and FIT had terminated.

On November 21, 2002, the Department again nominated Zelnik for emeritus status. This nomination followed the procedures established by the FIT Board of Trustees and included a recommendation to the Dean of the Art and Design Division. Brown, on March 28, 2003, responded by a memorandum to Takashyi Kamiya, the Chair of the Interior Design Department, in which she recognized that the nomination "follow[ed] the procedures and criteria established by the Faculty Handbook and the Board of Trustees" in that the Department requested recommendations from the Division Dean and the Vice President for Academic Affairs. Brown explained, however, that she had considered the nomination "anew" and found "nothing in it that would persuade [her], at [that] time, to recommend the elevation of Professor Zelnik to emeritus status to FIT's Board

of Trustees." Brown once again stated that Zelnik "dishonored FIT in his personal behavior in the course of his opposition to our proposed Streetscape plan." Brown noted in her memorandum of March 28 that while the Dean of Arts and Design had recommended the designation of Zelnik as Professor Emeritus, the Vice President of Academic Affairs had not made the same recommendation. FIT does not raise this procedural omission as part of its argument on appeal. To this date, Zelnik has not yet been granted the status of Professor Emeritus by FIT.

III. Proceedings in the District Court

Zelnik filed his Complaint in the United States District Court for the Southern District of New York on October 16, 2003, alleging, pursuant to 42 U.S.C. § 1983, violations of his First Amendment and New York State Constitutional rights. Following discovery, the parties cross-moved for summary judgment. In a decision read from the bench on September 2, 2005, the District Court dismissed Zelnik's Complaint in its entirety. The District Court, citing Galabya v. New York City Bd. of Educ., 202 F.3d 636 (2d Cir. 2000), determined that Zelnik could not prove one of the prima facie elements of a First Amendment retaliation claim, to wit, an adverse employment action. According to the court, Zelnik failed to demonstrate that denial of emeritus status was a materially adverse change in the terms and conditions of employment. Specifically, the court found that Zelnik had failed to demonstrate that he suffered a demotion or other detriment in his current terms of FIT employment, as the status of Professor Emeritus was simply an honorific title, which carried no additional benefits. The District Court, citing Phillips v. Bowen, 278 F.3d 103, 109 (2d Cir. 2002), also found that Zelnik failed to establish a sufficient 18 pattern of repeated and severe incidents of workplace harassment that, taken as a whole, would probably deter an average person from the exercise of their First Amendment rights.

Notice of Appeal was filed on September 23, 2005. Judgment was entered on September 27, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. Standard of Review

A district court's grant of summary judgment is reviewed de novo. Allianz Ins. Co. v. Lerner, 416 F.3d 109, 113 (2d Cir. 2005). This Court "utilizes the same standard as the district court: summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir. 1998). A material fact is one that would "affect the outcome of the suit under the governing law," and a dispute about a genuine issue of material fact occurs if the evidence is such that "a reasonable [factfinder] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 57 (2d Cir. 1997). In determining whether there is a genuine issue of material fact, the court must resolve all ambiguities, and draw all inferences, against the moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987). However, with respect to a properly supported summary judgment motion, the party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

II. Definition of Adverse Employment Action

As this Court has recently reaffirmed,

> [w]here the plaintiff is a public employee alleging that he suffered an adverse employment action as retaliation for the exercise of his First Amendment rights, . . . a plaintiff must initially show that
>
> (1) the speech at issue was made as a citizen on matters of public concern rather than as an employee on matters of personal interest, . . . (2) he or she suffered an adverse employment action, . . . and (3) the speech was at least a substantial or motivating factor in the [adverse employment action] . . . .

Morrison v. Johnson, 429 F.3d 48, 51 (2d Cir. 2005) (per curiam) (selected alterations in Morrison); see also Cobb v. Pozzi, 363 F.3d 89, 102 (2d Cir. 2004). For purposes of the instant appeal, defendants-appellees have "concede[d] that [Zelnik's] speech related to a matter of public concern and that [Brown's] decision not to grant emeritus status was linked to his speech." Apparently, they also concede that Zelnik is an employee, despite his status as a retiree. Moreover, it is uncontested that Zelnik exercised his right of speech as a private citizen and not as part of his official duties. Cf. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006) (holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline").

Accordingly, the only issue here is whether Zelnik is able to demonstrate that he suffered an adverse employment action. The gravamen of Zelnik's argument as presented to this Court is that the term "adverse employment action" has a different meaning in free speech retaliation cases than in Title VII and other discrimination cases and that the District Court applied the incorrect standard for measuring his adverse employment action

claims. Zelnik also argues that the District Court erred in finding that the status of Professor Emeritus does not confer any tangible benefits and that FIT and its officials did not engage in conduct that would have deterred a reasonable similarly situated individual from exercising his or her First Amendment rights.

Galabya, the case upon which the District Court relied, involved a claim of discrimination brought pursuant to the Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621 et seq.) ("ADEA"). In that case, we determined that "[a]n adverse employment action" within the meaning of the relevant legal standards is generally characterized as a "materially adverse change in the terms and conditions of employment." Galabya, 202 F.3d at 640 (internal quotation marks omitted). It may include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." Id. at 640. Because Zelnik could not demonstrate any material change in the terms and conditions of his employment, the District Court granted summary judgment to the defendants.

The standard applied by the District Court, however, is a more demanding standard than the one we have applied to First Amendment retaliation claims. "In the context of a First Amendment retaliation claim, we have held that '[o]nly retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action.'" Washington v. County of Rockland, 373 F.3d 310, 320 (2d. Cir. 2004) (quoting Dawes v. Walker, 239 F.3d 489, 493 (2d Cir. 2001) (alteration in Washington)); see also Hoyt v. Andreucci, 433 F.3d 320, 328 (2d Cir. 2006). In this context, "[a]dverse employment actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999). This list of retaliatory

conduct is certainly not exhaustive, however, and "lesser actions may also be considered adverse employment actions." Id. "Adverse employment actions may include negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process teacher's insurance forms, transfer from library to classroom teaching as an alleged demotion, and assignment to classroom on fifth floor which aggravated teacher's physical disabilities." Id. (citing Berheim v. Litt, 79 F.3d 318, 324–26 (2d Cir. 1996)). 3

While our cases thus have recognized a number of employment actions that we have characterized as adverse, we are guided by the general rule that "whether an undesirable employment action qualifies as being 'adverse' is a heavily fact-specific, contextual determination." Hoyt, 433 F.3d at 328.[1] A plaintiff cannot support such a determination unless he can show that an alleged act of retaliation is more than de minimis. See Davidson v. Chestnut, 193 F.3d 144, 150 (2d Cir. 1999) (collecting cases). Indeed, "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . ." Bart

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[1] We also note that although a public employee "may be required to show that the adverse action is of a type that, objectively 'would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights,'" Morrison, 429 F.3d at 51 (quoting Washington, 373 F.3d at 320), this Court has not held that "a public employee plaintiff is required to show that the defendants' action had an actual chilling effect." Id. (emphasis supplied). "[I]t is well settled that public employees alleging retaliation for engaging in protected speech are not normally required to demonstrate a chill subsequent to the adverse action taken against them." Id. (quoting Gill v. Pidlypchak, 389 F.3d 379, 382 (2d Cir. 2004)) (emphasis omitted).

v. Telford, 677 F.2d 622, 625 (7th Cir. 1982).

Zelnik quotes a passage in Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), for the proposition that the First Amendment protects public employees "from even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights," id. at 75 n.8 (internal quotation marks and citation omitted), but the quoted language is dicta and should not be read "literally," see Pierce v. Tex. Dep't of Criminal Justice, Institutional Div., 37 F.3d 1146, 1149 n.1 (5th Cir. 1994) ("We choose not to read the Supreme Court's dicta literally; rather, we apply the main analysis of Rutan to retaliation claims and require more than a trivial act to establish constitutional harm."); Davidson, 193 F.3d at 150 (characterizing the "birthday party" passage as dicta). The Supreme Court quoted the "birthday party" passage from the opinion of the Seventh Circuit Court of Appeals in that case, Rutan v. Republican Party of Illinois, 868 F.2d 943, 954 n.4 (7th Cir. 1989), which in turn inaccurately characterized the circuit's own holding in Bart. See Thaddeus-X v. Blatter, 175 F.3d 378, 398 (6th Cir. 1999) (recounting the history of the "birthday party" passage).

In Bart the court strongly indicated that not holding a birthday party would be de minimis and would not, therefore, support a retaliation claim. 677 F.2d at 626. However, in Bart the employee was "ridicule[d] for bringing a birthday cake to the office on the occasion of the birthday of another employee," even though bringing a birthday cake into work for another employee's birthday was a common practice in the office. Id. at 624. Moreover, this ridicule was considered a part of a larger "campaign of harassment which though trivial in detail may 15 have been substantial in gross," and therefore was actionable. Id. at 625. This Court's jurisprudence has recognized such "substantial in gross" claims before. See Phillips, 278 F.3d at 109 ("Our precedent allows a combination of seemingly minor incidents to form the basis of a constitutional retaliation claim

once they reach a critical mass."). As noted, the District Court found that Zelnik could not demonstrate such a "critical mass."

By focusing on "material adverse changes" in Zelnik's employment, rather than on the effect of FIT's actions on the exercise of free speech rights of a "person of ordinary firmness," we hold that the District Court applied the wrong standard to Zelnik's First Amendment retaliation claim. This conclusion is bolstered by the Supreme Court's recent decision in Burlington Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006). In Burlington Northern the Court held that "the anti-retaliation provision" of Title VII "is not limited to discriminatory actions that affect the terms and conditions of employment." Id. at 2412–13. Instead, the Court held that "actionable retaliation" was that which "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 2145 (internal quotation marks omitted). This Court has never held that a public employee plaintiff alleging retaliation in violation of the First Amendment must demonstrate a material change in employment terms or conditions. Our standard for First Amendment retaliation claims has always been the equivalent to the standard set forth in Burlington Northern.

Although we conclude that the District Court applied an incorrect standard in defining adverse employment action in the First Amendment retaliation context, the error is of no consequence. We simply do not believe, based upon our review of the factual record, that a jury could conclude that the denial of, or the refusal to consider for, emeritus status would deter an individual of ordinary firmness, situated similarly to Zelnik, from exercising his free speech rights under the facts in this case. See Washington, 373 F.3d at 320.

We hold that the failure to afford Professor Emeritus status to Zelnik was not an adverse action because the benefits of such status, given the record before us, carry little or no value and their deprivation therefore may be classified as de minimis.

See Davidson, 193 F.3d at 150. The benefit of emeritus status, such as it is in this case, is merely honorific. Zelnik has adduced no evidence in the record before us that a professor with emeritus status at FIT is entitled to any benefit or item of value beyond what is afforded to other retired faculty members. Zelnik alleges that professors with emeritus status at FIT are entitled to the use of FIT facilities and services. However, nothing in the record demonstrates what specific facilities and services are implicated. In any event, it appears that all retired professors are entitled to use certain FIT facilities. Zelnik therefore is entitled to the benefit of those facilities as a retired professor. His status as an Adjunct Professor also affords him access to certain institutional facilities when he is employed in that capacity. Moreover, Zelnik's title as a retired Full Professor remains intact.

Insofar as Zelnik claims that the status of professor emeritus carries with it things of intangible value, such as prestige, status, and respect within the FIT and wider academic community, he has failed to adduce any evidence of such matters beyond his conclusory statements. However, because the finding of an adverse employment action "is a heavily fact-specific, contextual determination," Hoyt, 433 F.3d at 328, we do not determine that denial of emeritus status could never support a finding of First Amendment retaliation. Indeed, at some institutions other than FIT, emeritus status apparently carries with it specific and well-defined benefits. See, e.g., JAMES E. MAUCH, JACK W. BIRCH, & JACK MATTHEWS, EMERITUS RANK IN MAJOR RESEARCH UNIVERSITIES: RETIREE PERQUISITES AND PRIVILEGES, EDUC. RES. INFO. CTR., U.S. DEP'T OF EDUC., OFFICE OF EDUC. RESEARCH AND IMPROVEMENT 1, 14 (1993) (summarizing the results of a questionnaire sent to members of the American Association of Universities regarding the "rights, opportunities[,] and eligibilities" extended to faculty retirees and emeriti of research universities and reporting that at some institutions retirees with emeritus rank are awarded "significantly more perquisites" than retired faculty in general), at http://www.eric.ed.gov. See generally JAMES E. MAUCH, JACK

W. BIRCH, & JACK MATTHEWS, INSTITUTIONAL. PLANNING FOR EMERITUS FACULTY, EDUC. RES. INFO. CTR., U.S. DEP'T OF EDUC., OFFICE OF EDUC. RESEARCH AND IMPROVEMENT 16 (1990) (encouraging educational institutions to "put real meaning and distinction into the emeritus rank and reserve it for active and interested faculty" and noting that "[f]aculty then might be more likely to treat the rank as an opportunity to make additional contributions, rather than as an honorific title without responsibilities or challenges"), at http://www.eric.ed.gov.

Zelnik did present to the District Court a declaration from a former FIT employee, Victoria Barbero, who worked in the FIT President's Office, attesting to tangible benefits afforded to professors emeriti. These benefits, according to Barbero, were enumerated in an unproduced university document and were "office space, access to FIT's library and a phone line." The document was said to have existed "during [her] tenure," which ended before Zelnik's retirement. Barbero attributes the non-existence of the document to a supposition that the "document must have been misplaced at some time between 1998 and the present." The current employee holding Barbero's position, Jeffrey Slonin, and the Vice President of Human Resources and Labor Relations at FIT, Annette Piecora, attested to the fact that the records of FIT do not contain such a document. We agree with the District Court that the affirmation of Barbero was insufficient to raise a genuine issue of material fact as to whether professors emeriti at FIT are afforded anything of value. It is significant that FIT does not have in place any written description of the benefits attendant to emeritus status.

It should also be noted that the criteria for receiving Professor Emeritus status are vague, imprecise, and highly discretionary. Such standardless criteria necessarily entail subjective determinations and do not permit this Court to ascertain or quantify the likelihood of an award of emeritus status to retired a Full Professor at FIT. The uncertainty of having the title of emeritus status conferred further undermines

the potential value of such status. As a consequence, it is even less likely that an individual of ordinary firmness would be deterred or dissuaded from exercising his free speech rights if threatened with the withholding of this purely honorific title. We have considered all of Zelnik's other claims and find them to be without merit.

CONCLUSION

In accordance with the foregoing, the summary judgment entered in the District court dismissing Zelnik's Complaint is hereby affirmed.

CONFERENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MARTIN ZELNICK,

Plaintiff,

v. 03 CV 8210 (LTS)

FASHION INSTITUTE OF
TECHNOLOGY, STATE UNIVERSITY
OF NEW YORK, et al.,

Defendants.
----------x

New York, N.Y.
September 2, 2005
3:45 p.m.

Before:

HON. LAURA TAYLOR SWAIN,

District Judge

APPEARANCES

BROACH & STULBERG, LLP0
Attorneys for Plaintiff
BY: JUDITH P. BROACH
JOSHUA S.C. PARKHURST

DAVIS WRIGHT TREMAINE, LLP
Attorneys for Defendants
BY: VICTOR A. KOVNER

* * * *

I have considered very carefully the motions for summary judgment, and I have reached a decision, which I am going to render now on the record. Before the Court in this section 1983 action, in which the plaintiff alleges that the defendant academic institution and administrators violated his First Amendment and New York State Constitutional rights, are two summary judgment motions pursuant to rule 56 of the Federal Rules of Civil Procedure. Defendants move for summary judgment dismissing plaintiff's complaint in its entirety. Plaintiff seeks summary judgment in his favor, asking the Court to order defendants to promptly award plaintiff emeritus status. Discovery has been completed. The Court has jurisdiction of this action pursuant to 28 USC sections 1331 and 1343. Jurisdiction of the state claims is invoked pursuant to pendent jurisdiction. The Court reserves the right to make nonsubstantive changes in the transcript of this oral decision in the event one is prepared. For the following reasons, defendant's motion for summary judgment is granted and plaintiff's motion is denied.

Plaintiff, a retired Fashion Institute of Technology professor – and I'll refer to the institution as FIT – who also serves as an adjunct professor at that institution, claims that he was denied emeritus status in retaliation for his exercise of free speech and associational rights in connection with opposition to an FIT plan to block a street adjacent to that college.

The following facts are undisputed except to the extent I specifically indicate otherwise. In or around July 1999, plaintiff, who is part owner of a building located on the affected street, and other members of the community, formed an informal organization called the 27th Street Block Association to discuss their concerns regarding FIT's proposed Streetscape project, which was designed to create a campus-type environment by closing portions of the street.

Plaintiff's statements on behalf of the block association and his objections to the Streetscape project included the following: A July 1999 letter to residents living near FIT outlining the benefits and drawbacks of this Streetscape project, a July 1999 letter to a New York City commissioner regarding the association's position on the project, a June 2000 letter to an assemblyman advising him of the potential safety problems of the project, a September 1999 letter to FIT on behalf of the association requesting additional information regarding the project, a February 2001 interview with a Village Voice reporter, a March 2001 letter to a newspaper describing potential hazards regarding the project, and meetings in July 1999 and December 2000 with fellow association members.

A business entity in which plaintiff holds an interest was also a party plaintiff in state court litigation challenging the FIT project. Defendants assert that plaintiff also made or can reasonably be held responsible for additional actions and statements, including the distribution of flyers challenging the safety of the project and impugning FIT's concern for community safety.

In December 1999, plaintiff retired as a full-time professor with the interior design department of FIT. He remains an adjunct professor and employee of FIT, occasionally teaching a class. In June 2000, the interior design department nominated plaintiff for emeritus status, an exceptional honor bestowed upon retired FIT professors and signifying excellence. Plaintiff asserts that emeritus status also carries with it the right to office space and phone use at FIT, as well as the right to use FIT's library and other facilities. It is undisputed that retired faculty, such as plaintiff, have the right to use FIT's library and other facilities, and that office and phone use are provided to adjunct faculty, at least during the terms in which they are teaching. Defendants deny that emeritus status carries any separate tangible benefits.

There is some dispute as to the exact procedures and recommendations required for emeritus status. The parties also dispute whether FIT grants emeritus status to everyone who meets the relevant substantive requirements or whether FIT treats these requirements as merely threshold criteria. However, there is no dispute that such status requires an official recommendation from Defendant Brown, president of the university, and final approval by the board of trustees. There is also no dispute that Defendant Brown, president of FIT, declined to recommend plaintiff for emeritus status in memoranda dated January 2002 and March 2003. The parties dispute the extent to which President Brown's decision was final and also dispute the extent to which it was based on plaintiff's opposition to the Streetscape project. There is no dispute that FIT is a government entity whose actions are subject to the strictures of the First Amendment and the comparable provisions of the New York State Constitution.

I turn now to the legal analysis. Summary judgment shall be granted in favor of a moving party where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In the summary judgment context, a fact is material if it might affect the outcome of the suit under the governing law, and an issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Holtz v. Rockefeller & Company, Inc., 258 F.3d 62, 69, Second Circuit 2001. See also rule 56 (c) of the Federal Rules of Civil Procedure.

The Second Circuit has explained that the party against whom summary judgment is sought must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. Caldarola v. Calabrese, 298 F.3d 156, 160, Second Circuit 2002. Mere

conclusory allegations, speculation or conjecture will not provide a sufficient basis for a nonmoving party to resist summary judgment. Cifarelli v. Village of Babylon, 93 F.3d 47, 51, Second Circuit 1996.

When cross-motions for summary judgment are filed, the standard is the same as that for individual motions for summary judgment. Natural Resources Defense Council v. Evans, 254 F. Supp. 2d 434, 438, Southern District of New York 2003. The court must consider each motion independently of the other, and when evaluating each, the Court must consider the facts in a light most favorable to the nonmoving party. And I give the same citation for that principle.

Claims of prohibited retaliation for exercise of free speech rights are evaluated under a burden-shifting standard that applies to both the federal and the New York State Constitutional claims. The plaintiff must first proffer sufficient evidence to make out a prima facie case. A plaintiff must demonstrate that, one, the speech addressed a matter of public concern; two, he suffered an adverse employment action; and, three, a casual connection existed between the speech and the adverse employment action, so that it can be said that his speech was the motivating factor in the determination. Cobb v. Pozzi, 363 F. 3d 89, 102, Second Circuit 2004. See also Martinez v. Sanders, 2004 Westlaw 1234041 at *3, Southern District of New York, June 3, 2004. If the plaintiff proffers a prima facie case, defendants must, in response, one, demonstrate by a preponderance of the evidence that they would have taken the same adverse action regardless of the protected speech; or, two, show that the plaintiff's expression was likely to disrupt their activities and that the likely disruption was sufficient to outweigh the value of the plaintiff's First Amendment expression. The latter balancing rationale is commonly known as the Pickering balancing test, Cobb v. Pozzi 363 F. 3d at 102.

For purposes of this motion practice, defendants concede that plaintiff's speech related to a matter of public concern and that defendant's decision not to grant emeritus status was linked to his speech. In evaluating whether plaintiff's evidence is sufficient to make out his prima facie case, the Court, therefore, turns its focus to the question of whether he has demonstrated that he suffered an adverse employment action.

An adverse employment action within the meaning of the relevant legal standards is generally characterized as a materially adverse change in the terms and conditions of employment. Galabya v. New York City Board of Education, 202 F.3d 636, 640, Second Circuit 2000. It may include a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation. Here, there is no allegation that plaintiff has suffered a demotion or other detriment in his current terms and conditions of FIT employment. Rather, he alleges that he has been denied an additional title, one that he claims carries with it both significant prestige and tangible benefits.

Despite the language in Galabya suggesting that a "less distinguished title" could constitute a material adverse change in employment conditions, research has disclosed no case in which denial or loss of title or prestige, without concomitant loss in tangible benefits, is sufficient to constitute an adverse employment action. Rather, as the Galabya Court made clear, the key issue is whether the challenged action caused plaintiff to suffer a materially significant disadvantage. See Galabya at page 641. Courts weighing claims of adverse title or prestige changes look at tangible detriment issues as well.

The following decisions are illustrative. In Crady v. Liberty National Bank, which is a case relied upon by the Galabya court and ADEA action, the Court concluded that the

loss of an assistant vice president title alone was not sufficient to constitute an adverse employment action, and the relevant portion of the decision is found at 993 F. 2d at page 136.

Galabya itself is also illustrative. There an employee was found to have failed to establish that a transfer from teaching special education keyboarding class in a junior high school to a mainstream high school keyboarding class changed his responsibilities or was a sufficient setback in his career as to constitute an adverse employment action, notwithstanding the fact that the facilities were inferior and he was reassigned outside of his area of expertise.

I also direct your attention to Chu v. City of the New York, 2000 Westlaw 1879851 at *7, a December 27, 2000, Southern District of New York decision. In that title VII retaliation suit, the Court found no adverse employment action where the only potential adverse effect was that the individual was transferred out of a so-called elite police unit. The Court said that the employee failed to offer any evidence to establish that the transfer was a setback to his career, was tantamount to a demotion, or was a materially adverse change in any other way in the terms and conditions of his employment. Clarke v. City of New York, 2001 Westlaw 876926 at *5 to *6, an August 1, 2001 Eastern District of New York decision, is also instructive. There the Court found no adverse employment action in a First Amendment retaliation suit and concluded that plaintiff's claim that as a result of his transfer he has not been invited to speaking engagements and to provide expert opinions is shaky, as plaintiff fails to provide any specific examples of past lost opportunities. Thus, plaintiff's claim of loss and prestige is unsupported by actual facts. And that was affirmed in summary opinion at 41 Fed. Appx. 520, Second Circuit 2002.

I will also direct your attention, without detailing the facts, to Flaherty v. Gas Research Institute, 31 F.3d 451, 457, a 1994 7th Circuit decision involving a change of title from

principal scientist to senior project manager. And Forkkio v. Powell, 306 F.3d 1127, 1130, DC Circuit 2002, where the Court said that purely subjective injuries, such as dissatisfaction with a reassignment or public humiliation, loss of reputation, are not adverse actions. De La Cruz v. New York City Human Resources Administration Department of Social Services, 82 F.3d 16, Second Circuit 1996, is not to the contrary. In that case, the Second Circuit reversed the district court's dismissal of a pleading alleging that a transfer from one HRA unit to another resulted both in a loss of prestige and the loss of professional growth opportunity. The Court characterized this allegation of an adverse employment action as "quite thin" but found that the question of whether the plaintiff had been harmed by the transfer was a question of fact. Here, discovery has been completed, and the record read in the light most favorable to the plaintiff fails to support his assertion that he has been harmed in a materially significant way.

The defendants have proffered affidavits denying that emeritus status carries with it rights to any tangible benefits, and it introduced uncontroverted evidence that retired professors are entitled to use FIT facilities and that adjunct professors have office and phone privileges. Defendants have also submitted a policy manual or handbook, the authenticity of which plaintiff acknowledges, that specifies benefits associated with retiree status but does not provide for any tangible benefits of emeritus status other than the right to append the title "emeritus" to the retired professor's academic title.

In support of his claim that emeritus status does carry tangible benefits, plaintiff proffers only his own conclusory statements regarding the effect of the prestige of the title on a retired professor's marketability and access to the academic market, assertions that access to FIT facilities goes with that title, and affidavits from Victoria Barbero, a former official of FIT, asserting that during her tenure with the institution, which ended in 1998, professors emeriti were accorded "tangible benefits."

The only such benefits she specifies were office space, access to FIT's library and a phone line. Barbero also attested to the perceived prestige of the title and asserts that she recalls that the benefits available to emeritus faculty were outlined in a separate document which, she speculates, must have been "misplaced" if it cannot be found now.

Defendants have proffered affidavits from the current occupant of Ms. Barbero's former position, Jeffrey Slonim, and from Annette Piecora, vice president of human resources and labor relations at FIT, denying that the relevant records of the institution contain any document specifying benefits available to emeritus faculty.

Barbero's affidavit is insufficient to raise a genuine issue of material fact as to whether emeritus faculty status carries tangible benefits. She can and does speak only to her understanding of the status of policies as of the time she was with FIT, and her speculation as to the existence of a dimly-remembered document is insufficient to raise a triable issue as to whether there is currently a policy attaching tangible benefits to emeritus status.

The Court notes that defendants have proffered a 1991 memo from Ms. Barbero to which she appears erroneously to have attached a benefit policy inapplicable to FIT emeritus faculty. Although Ms. Barbero denies in a further affidavit that the policy statement is the document to which she referred in her initial affidavit, the Court finds that no reasonable jury could conclude from this record that emeritus status carries tangible benefits or that the denial of that status carries tangible benefits or that the denial of that status subjected plaintiff to any other materially significant disadvantage so as to constitute an adverse employment action.

Plaintiff argues that, even if he has failed to identify an adverse employment action by way of a demonstration of loss or

denial of tangible benefits, his proffered evidence is sufficient to demonstrate harassment rising to the level of an adverse employment action. Plaintiff's proof unfortunately falls short of the mark in this regard as well.

To prove that harassment constitutes an adverse employment action, plaintiff must demonstrate that the actions allegedly taken by defendants created a working environment in which there are repeated and severe incidents of harassment that, taken as a whole, would probably deter an average person from the exercise of their First Amendment rights. Phillips v. Bowen, 278 F.3d 103, 109, Second Circuit 2002. Courts apply an objective standard in determining whether an employee's working environment has been unreasonably inferior and adverse when compared to the typical normal workplace. See the Philips case, and see also Dawes v. Walker 239 F. 3d 489, 493, Second Circuit 2001. Here, the plaintiff has not proffered any evidence indicative of repeated or severe harassment. Plaintiff relies principally on memoranda from the president and the vice president of academic affairs, issued over an approximately four-year period, declining to recommend plaintiff for emeritus status and on an alleged announcement by the president expressing her displeasure that plaintiff was involved in the Streetscape opposition. These minor incidents simply do not attain the critical mass requires to show an unreasonably inferior workplace. See Phillips v. Bowen, 278 F.3d at 109.

The Court, therefore, finds that no reasonable jury could conclude from these limited actions that FIT created such a working environment in which a reasonable person in plaintiff's position would be deterred from exercising his First Amendment rights. Plaintiff, thus, cannot satisfy the requisites of the adverse employment action prong in a prima facie case, even when the facts are argued in the light most favorable to them.

Defendants are purportedly entitled to judgment dismissing the complaint as a matter of law, and their motion is

granted. Plaintiff's motion for summary judgment is, consequently, denied.

In light of the Court's analysis of the prima facie case issue, it is unnecessary for the Court to address the parties' other arguments or to schedule further proceedings in this case. The Court will enter an order providing that, for the reasons stated on the record of today's proceeding, the defendant's motion for summary judgment is granted, and plaintiff's motion for summary judgment is denied. And we'll respectfully request that the clerk of the court close this case. And so I am signing an order now, and I'll ask that Ms. Durocher make some copies for counsel. And I thank you very much for your attention. I thank you for your advocacy in connection with these motions. You get an oral decision today, because I am working on it until the last minute. It was a difficult set of issues that I wanted to be able to reason through carefully and explain my reasoning well. So thank you all. We're adjourned.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

United States
Court of Appeals
Second Circuit
Filed
Dec - 6 2006
Thomas Asreen,
Acting Clerk

Date:

Docket Number:	05-5131-cv
Short Title:	Zelnik v. Fashion Institute
DC Docket Number:	03-cv-8210
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Laura Swain

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of December two thousand six.

Martin Zelnik,

Plaintiff-Appellant,

v.

Fashion Institute of Technology, State University of New York, Joyce F. Brown, individually as President of Fashion Institute of Technology, State University of New York,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en

banc having been filed herein by the appellant Martin Zelnik. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: /s/
Motion Staff Motion

No. 06-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

MARTIN ZELNIK,

Petitioner,

--against--

FASHION INSTITUTE OF TECHNOLOGY, STATE UNIVERSITY OF NEW YORK, JOYCE F. BROWN, INDIVIDUALLY AS PRESIDENT OF FASHION INSTITUTE OF TECHNOLOGY, STATE UNIVERSITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL WORKRIGHTS INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF PETITIONER MARTIN ZELNIK

Lewis L. Maltby, Esq.
Attorney for Amicus Curiae
National Workrights Insitute
166 Wall Street
Princeton, NJ 08540
(609) 683-0313

INTEREST OF AMICUS CURIAE

The National Workrights Institute is a not-for-profit organization dedicated to protecting civil liberties in the American workplace. The Institute was founded in 1990 as division of the national office of the American Civil Liberties Union. In 2000, the Institute became an independent organization.

Protecting freedom of expression is a key part of the Institute's mission. The Institute participated as amicus in Wilson v. Graham County, in which this Court considered whistleblower protection under the False Claims Act and also participated in Cotto v. Sikorsky Aircraft, in which the Supreme Court of Connecticut applied its state's statute on employee freedom of expression.

Institute staff members helped draft and enact legislation in California, Colorado, New York, and North Dakota prohibiting employment discrimination based on off-duty political behavior and legislation protecting whistleblowers in Georgia and Rhode Island. Our model legislation articulating the boundaries between protected employee expression and speech which damages the legitimate interests of the employer has been used many time by legislators, advocates, and academics. The Institute has also been involved with numerous initiatives to expand federal legal protection for whistleblowers.

Institute president Lewis Maltby has addressed numerous groups regarding employee freedom of expression, including the National Academy of Arbitrators. His remarks on employer control of employee speech have been featured by the National Law Journal, Bureau of National Affairs, Associated Press, and Legal Times.

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STATEMENT OF THE CASE

Martin Zelnik brought suit in the United States District Court for the Southern District of New York against a public college, Fashion Institute of Technology, State University of New York ("FIT") alleging that FIT and its president had violated his rights under the First Amendment by refusing to grant him professor emeritus status in retaliation for his political speech against a project in which FIT was involved.

Zelnik was full professor at FIT in the Interior Design Department. He retired in 1999 after 30 years as a member of the faculty. He continues to practice as an architect and interior designer.

In early 1999, FIT announced that it intended to close a portion of 27th Street in New York City in order to create a campus like environment. Zelnik expressed concerns regarding aspects of the project that he believed created danger for pedestrians. He helped form a neighborhood association opposing the project and suggesting safer alternatives.

FIT's president, Dr. Joyce Brown, retaliated against Zelnik by refusing to approve his nomination for emeritus professor by the Interior Design Department. Brown sent a memorandum to the chair of the department linking her decision to deny Zelnik tenure to his opposition to the project.

The district court granted FIT's motion for summary judgment. The Court of Appeals for the Second Circuit upheld the decision on different grounds, finding that the denial of emeritus status, even if retaliatory, did not rise to the level of an actionable claim.

REASONS FOR GRANTING THE WRIT

Nothing is more important in our Constitutional system than protecting the right to freedom of expression. Public employers, because they have the ability to inflict severe penalties, are capable of intimidating employees whose speech displeases them. It is essential that the federal courts prevent such intimidation.

This Court has recognized the importance of protecting public employees from retaliation for political activity. In Burlington Northern & Santa Fe Railway Co. v. White, it created a legal standard that effectively accomplishes this goal. An employer's conduct is actionable only if "the retaliatory conduct would deter a similarly situated individual of ordinary firmness from exercising his or her rights". The court of appeals decision in this case, while purporting to follow Burlington Northern, actually recreates the type of ineffective standard that Burlington Northern intended to eliminate.

Other circuits have consistently recognized that a penalty need not be devastating to have an impermissible deterrent effect. For example, in Garcia v. City of Trenton, Missouri, 348 F. 3d 726 (8th Cir. 2003) the court found that receiving four parking tickets totally $35 (in retaliation for complaining to the mayor about town ordinances) was sufficient to support a finding that a person of ordinary firmness would be chilled. The trial judge's post-verdict judgment in favor of defendant was reversible error. In Glass v. Dachel, 2 F. 3d 733 (7th Cir. 1993), the seventh circuit found that a letter of reprimand was sufficiently serious to be actionable.

In the present case, Zelnik claimed that losing the title "Professor Emeritus" made it more difficult for him to obtain clients for his private architectural/design firm. This is not at all far-fetched. Most professors never achieve emeritus status. It is undisputed that the title "Professor Emeritus" increases ones

credibility and respect. This is especially important with individuals who lack first hand experience with a person and must judge them on his or her credentials. One would expect emeritus status to be an asset in business development.

Zelnik also claimed that losing the title "Professor Emeritus" was a significant penalty even if it had no monetary value. In FIT's own words, emeritus status is "an exceptional honor". Academics receive lower financial compensation than the members of their profession that enter the private sector. In some cases, they earn but a fraction of what they would in the commercial world. One of the principal reasons highly capable professionals are willing to make this financial sacrifice is the respect and prestige that are associated with being a professor. Zelnik's claim that losing the prestige of emeritus status is a significant penalty that could deter others from taking political action that offends the college is thus highly plausible.

It is also significant that denying Zelnik the honor of emeritus status is the only penalty that FIT could impose upon him. FIT did not have the ability to impose a greater penalty and decline to impose it. It would be far from unreasonable for others contemplating political action that might offend FIT to believe that the college would impose harsher penalties where it was in a position to do so.

These penalties could easily outweigh those found to be sufficient to support a decision in favor of the plaintiff in cases such as Garcia and Glass.

This does not mean that Zelnik was entitled to summary judgment. Federal courts have consistently held that whether a particular penalty would have an impermissible deterrent effect is an issue of fact to be determined by a jury. Perhaps FIT could have persuaded the jury that the denial of emeritus status is too small a penalty to discourage other professors from speaking their minds.

The case, however, did not go to a jury. Instead, the court of appeals determined that loss of emeritus status would not have an impermissible deterrent effect. This was clearly a question of fact that should have gone to the jury. Bart v. Telford, 677 F.2d 622 (7th Cir. 1982). It is well established that it is reversible error for judges to usurp the province of the jury in this manner.

Federal judges are not well suited to make this factual determination, even if it were theirs to make. Federal judges have life tenure. They cannot be fired for speaking their mind about political issues, nor can they be punished in any other manner. How are they to know the feelings of those who must work without these protections? Cases like these are far better decided by juries, whose life experience enables them to understand what employer actions would intimidate employees.

Moreover, the court below provided no rationale for its decision. It provides literally no explanation for its conclusion that other faculty members would not be intimidated by what happened to Zelnik. One is left with the conclusion that they considered the question too obvious to require thought or explanation. This is the antithesis of the careful consideration of factual issues that we rightfully expect from juries. The apparent ease with which the three members of the court of appeals decided this question illustrates their isolation from the world in which Zelnik and other employees must work.

The decision by the court of appeals is not only incorrect, but destructive. It allows public employers in the second circuit to retaliate against employees when it disapproves of their political speech, knowing that if the penalty appears small the courts will grant summary judgment in their favor. It also encourages public employers in the rest of the country to retaliate by providing them with a precedent that they can argue immunizes them from liability.

Because the issues involved are critical to protecting the first amendment rights of all public employees, and because the decision below is in conflict with the decision of this Court and the decisions of the other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the National Workrights Institute respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Lewis L. Maltby, Esq.
National Workrights Institute
166 Wall Street
Princeton, NJ 08540

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